Pea Ridge Iron Ore Company, Inc. ***and*** **Unification Organizing Committee, United Auto Workers (UAW), International Association of Machinists (IAM), United Steel Workers of America (USWA), AFL–CIO–CLC. Petitioner.** Case 14–RC–12165

August 24, 2001

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election in the above-captioned case conducted on June 7 and 8, 2000, and the Regional Director's supplemental report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows that of approximately 70 eligible employees, there were 33 votes cast for and 32 votes cast against the Petitioner, with no challenged or void ballots.

The Board has reviewed the record in light of the Employer's exceptions and brief, and has adopted the Regional Director's findings and recommendations only to the extent consistent with this Decision.

Under the Stipulated Election Agreement, the election was scheduled to be held from 5:30 to 6:30 p.m. on June 7, 2000, and from 6:00 to 8:00 a.m. and 3:30 to 6:30 p.m. on June 8, 2000. The Regional Director found, and it is undisputed, that the polls did not open until 5:37 p.m. on June 7, 2000. The Employer contends that the election should be set aside because the late opening of the polls possibly impaired the right of a determinative number of eligible voters to vote and thereby affected the outcome of the election.

In the course of his investigation into the Employer's objections, the Regional Director obtained statements from the five eligible voters who did not vote. Three of the eligible voters stated that they were out of town on vacation on June 7, a fourth stated he was unavailable because of a medical emergency on that date, and a fifth appeared at the polls on June 7 when they were open, but decided not to vote.

On the basis of these statements, the Regional Director concluded that no eligible voter was possibly disenfranchised by the late opening of the polls. We disagree.

When election polls are not opened at their scheduled times, the proper standard for determining whether a new election should be held is whether the number of employees possibly disenfranchised thereby is sufficient to affect the election outcome, not whether those voters, or any voters at all, were actually disenfranchised. *Wolverine Dispatch, Inc.*, 321 NLRB 796, 697 (1996). The Board has made it clear that this objective standard not only safeguards the choice of the majority of employees voting in the election, but also is necessary to protect the integrity of the election process itself. Id.; *Midwest Canvas Corp.*, 326 NLRB 58, 59 (1998). Thus, the Board has consistently adhered to an objective standard that does not rely on after-the-fact statements obtained from eligible voters as to the reasons why they did not vote in an election. See, e.g., *G.H.R. Foundry Div., Dayton Malleable Iron Co.*, 123 NLRB 1707, 1709 (1959); *Whatcom Security Agency, Inc.*, 258 NLRB 985 (1981); *Nyack Hospital*, 238 NLRB 257, 259 (1978).

Here, the Regional Director erred by relying on such a statement. Thus, the statement from one employee that he appeared at the polls on June 7 but "decided not to vote" is clearly his subjective explanation for not voting. This is precisely the type of statement that the Board has said it will not accept as a means of determining subjective voter intent. Thus, it does not constitute evidence sufficient to establish that the employee could not possibly have been prevented from voting by the late opening of the polls.

Under these circumstances, where the election was decided by one vote, we find that the late opening of the polls potentially affected the results of the election. We therefore sustain the Employer's objection and order that the election be set aside and a new one held.[1]

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the

[1] The Regional Director's reliance on the statements from the other four employees who did not vote raises a closer issue. However, since the fifth employee's situation was determinative, we need not reach this issue.

eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Unification Organizing Committee, United Auto Workers (UAW), International Association of Machinists (IAM), United-Steel Workers of America (USWA), AFL–CIO–CLC.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. August 24, 2001

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting.

I would uphold the election and certify the Union. I agree that the Board does not accept post-election statements regarding the subjective reasons for an employee's failure to vote.[1] However, the instant case does not involve such statements. Rather, it involves contemporaneous objective facts which clearly indicate that the five employees' failure to vote was not caused by the 7-minute delay in opening the polls. That is, three employees were vacationing out of town on the date of the election. A fourth had a medical emergency on that date. A fifth employee appeared at the polls *when they were open*, and nonetheless declined to vote.

With respect to this fifth employee, the significant point is not that he "decided not to vote." Rather, the significant point is the objective fact that he arrived at the polls when they were open. Clearly and objectively, the late opening of the polls had nothing whatever to do with his nonvoting.

Wolverine Dispatch, Inc., 321 NLRB 796 (1996), does not support the position of my colleagues. The Board there held that it would set aside an election if "the number of employees possibly disenfranchised due to polls being closed when scheduled to be open is sufficient to affect the election outcome." As discussed above, the objective evidence in the instant case affirmatively shows that no employees were possibly disenfranchised because of the 7-minute delay in opening the polls. Their failure to vote was attributable to other factors.

In short, this case does not involve the vice of *G.H.R.* and *Whatcom*, viz. probing into subjective intentions revealed by post-election statements.

I recognize that, in *Whatcom*, the Board also set forth a secondary rationale for overturning the election. The Board said:

> Moreover, where the irregularity concerns an essential condition of an election, and calls into question a determinative number of ballots to affect the outcome, to maintain the Board's high standards the election must be set aside.

It is difficult to ascertain whether this secondary rationale, by itself, would have prompted the result in *Whatcom*. However, even if it would have done so, it has no application here. As discussed above, the objective evidence makes it clear that the "irregularity" in this case had *no* effect on the outcome of the election. Accordingly, I would certify the Union.

Dated, Washington, D.C. August 24, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

[1] See *G.H.R. Foundry Div., Dayton Malleable Iron Co.*, 123 NLRB 1707, 1708 (1959); *Whatcom Security Agency, Inc.*, 258 NLRB 985 (1978).